

# Order

Michigan Supreme Court  
Lansing, Michigan

April 13, 2005

Clifford W. Taylor  
Chief Justice

Michael F. Cavanagh  
Elizabeth A. Weaver  
Marilyn Kelly  
Maura D. Corrigan  
Robert P. Young, Jr.  
Stephen J. Markman  
Justices

ADM File No. 2004-60

Proposed Amendment of  
Rule 9.205 of the  
Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.205 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [www.courts.michigan.gov/supremecourt](http://www.courts.michigan.gov/supremecourt).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

## Rule 9.205 Standards of Judicial Conduct

- (A) [Unchanged.]
- (B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice.

### [ALTERNATIVE A]

In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint.

### [ALTERNATIVE B]

In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

(1)-(3) [Unchanged.]

Staff Comment: This order invites comments on two alternative proposed amendments of MCR 9.205(B). Both would allow the Judicial Tenure Commission to recommend and this Court to order that a disciplined judge pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint of judicial misconduct. Alternative B is narrower in that it only allows costs to be assessed where the judge is engaged in conduct involving fraud, deceit, intentional misrepresentation, or misleading statements to the commission, the commission's investigators, the master, or the Supreme Court. Cf. *In re Noecker*, 472 Mich 1 (2005).

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC\_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-60. Your comments and the comments of others will be posted at [www.courts.mi.gov/supremecourt/resources/administrative/index.htm](http://www.courts.mi.gov/supremecourt/resources/administrative/index.htm).

WEAVER, J. I propose for public comment Alternative C: consideration of whether this Court has the constitutional authority to assess a judge for the costs incurred as a result of a Judicial Tenure Commission (JTC) proceeding instituted against that judge.

Article 6, § 30(2) of the 1963 Michigan Constitution provides:

On recommendation of the judicial tenure commission, the supreme court may *censure, suspend with or without salary, retire or remove a judge* for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. *The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.* [Emphasis added.]

It has been suggested that the emphasized text in § 30 provides the authority for the Supreme Court to assess costs. However, the language is very specific: the Supreme Court has the authority to “censure, suspend . . ., retire or remove a judge . . .” There is no grant of power to this Court to assess costs. Further, while it has also been suggested that the grant of power to “make rules implementing this section” authorizes the Court to adopt a rule assessing costs, that suggestion is at best questionable. The rulemaking authority granted by the Michigan Constitution applies only to the specifically enumerated powers granted to this Court, i.e., to “censure, suspend . . ., retire, or remove

a judge . . . .” Moreover, the rulemaking authority is applicable to *procedural* rules, not substantive rules.

The state of Montana has a constitutional provision authorizing judicial discipline that is virtually identical to Michigan Const 1963, art 6, § 30. In *Harris v Smartt*, 316 Mont 130 (2003), the Montana Supreme Court addressed the issue of imposing costs on a respondent judge, and ultimately held that the Montana Constitution did not provide the authority to assess costs. Specifically, the constitutional language that provided for the creation of Montana’s Judicial Standards Commission enumerated a limited number of powers to the state supreme court. The pertinent portion of the Montana Constitution provides:

Upon recommendation of the commission, the supreme court may:

(a) Retire any justice or judge for disability that seriously interferes with the performance of his duties and is or may become permanent; or

(b) Censure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties, violation of canons of judicial ethics adopted by the supreme court of the state of Montana, or habitual intemperance. [Mont Const, art 7, § 11(3).]

The Montana Supreme Court held that this language did not provide the court with the authority to assess costs:

[T]he framers of the Constitution specified what the Commission can recommend and what sanctions the Supreme Court can impose; retirement, censure, suspension or removal from office. *Expressio unius est exclusio alterius*. The express mention of the above sanctions implies the exclusion of non-expressed sanctions. We conclude that the imposition of costs and attorney fees exceeds the power granted to either the Commission or this Court by the Montana Constitution. [*Harris, supra* at 134-135.]

Since Michigan’s comparable constitutional provision is virtually identical to that of the Montana Constitution, it is questionable whether this Court has authority to assess costs. Where the Michigan Constitution specifically lists only certain powers available to this Court, it follows that this Court may not exceed its authority by adding a new power not specifically granted to the Court.

The Montana Constitution also has a rulemaking provision that instructs the state’s Judicial Standards Commission to “investigate complaints, and make rules implementing this section.” Mont Const, art 7, § 11(2). In *Harris*, the Judicial Standards Commission had argued that its rulemaking authority allowed it to adopt a rule assessing costs against a respondent judge because such a rule was “procedural.” The *Harris* court took issue with the commission’s characterization of the rule as procedural:

Such a rule serves as a deterrent and is thus substantive rather than procedural. As the \$52,000 statement of costs in the present case graphically illustrates, an award of costs and attorney fees amounts to a very substantive “deterrent.” The prospect of having to pay not only one’s retained counsel but also the costs and attorney fees of counsel for the Commission would not only serve to deter unethical conduct but also would most certainly serve to deter judges from properly defending a charge of unethical conduct. [*Harris, supra* at 135.]

In finding the rule assessing costs to be “substantive” rather than “procedural,” the *Harris* court determined that the commission had exceeded its constitutional authority.

Likewise, in Michigan, it appears that a cost assessment rule would be substantive, not procedural. Const 1963, art 6 § 30(2) grants this Court the authority to “make rules implementing this section,” but this Court may not use the provision as the basis for adopting a rule that is not specifically tied to the enumerated powers to censure, suspend, retire, or remove a judge.

This issue most recently arose in *In re Noecker*, 472 Mich 1 (2005). There the JTC recommended that the Court assess as costs the \$22,572.76 in expenses it had incurred in prosecuting the matter to conclusion before the master. In addition, a minority of the JTC recommended the Court impose as costs the expenses incurred by the taxpayers for visiting judges who replaced Judge Noecker during his suspension.

As I said in concurring in *In re Noecker, supra* at 18-19:

I would not assess costs because it appears to me that this Court has no constitutional authority to assess the judge for the costs of the proceedings. Const 1963, art 6, § 30 provides that “the supreme court may censure, suspend with or without salary, retire or remove a judge . . . .” Nothing in this constitutional provision gives this Court any authority to discipline the judge by assessing the judge the costs of the Judicial Tenure Commission proceedings against him or her.



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 13, 2005 4 Inger J. Meyer  
Deputy Clerk